

STATE OF NEW JERSEY, : SUPREME COURT OF NEW JERSEY
 : DOCKET NO. 072323
 :
 Plaintiff- :
 Respondent, :
 :
 v. : On Motion for Leave
 : to Participate
 : as Amicus Curiae
 :
 GIUSEPPE TEDESCO, :
 :
 Defendant- : SAT BELOW:
 Petitioner. : Hon. Anthony J. Parrillo, P.J.A.D.
 : Hon. Douglas M. Fasciale, J.A.D.

BRIEF OF AMICUS CURIAE
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

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LEGAL ARGUMENT

SIMILAR TO THE OPTION OF WAIVING A MYRIAD OF RIGHTS GUARANTEED BY THE CONSTITUTION, A DEFENDANT IN A CRIMINAL CASE SHOULD BE PERMITTED TO WAIVE HIS OR HER RIGHT TO BE PRESENT DURING SENTENCING.

Public policy is not furthered by compelling a defendant's physical presence at sentencing when the defendant seeks to waive his or her right to appear. While a defendant in a criminal case has a right to be present at the critical stages of a criminal proceeding, the ACDL-NJ is unaware of any "right" to be absent from sentencing. However, a waiver should be permitted.

Sentencing has evolved into a predominantly ministerial act insofar as sentencing procedures adhere to certain guidelines promulgated by this Court. The sentence must be within ranges set by the Legislature and is thus generally predictable. A defendant who believes, for example, that his or her presence may generate disruption in the courtroom or may adversely affect the sentence should be permitted to excuse himself or herself. While sentencing judges should not take into account courtroom outbursts beyond a defendant's control, a defendant facing sentencing may believe otherwise.

Here, the sentencing judge held that Defendant had no right to absent himself from sentencing. The Appellate Division agreed, conducting a balancing test that weighed Defendant's request to absent himself from sentencing against the "rights" of victims and "State's interest" in having Defendant "face those he has wronged."

Defendant's presence does not compromise the "rights" of victims, and the court below should not have given that factor any weight. A victim has no "right" to address the Defendant under common law, under our State Constitution, or under the Crime Victims Bill of Rights.

With the passage in 1985 of the Crime Victims Bill of Rights, N.J.S.A. 52:4B-34 et seq., the Legislature promulgated rules to preserve "fairness, compassion and respect" for crime victims. L. 1985, c. 249, § 1. Then, in 1991, the State Constitution was amended to include a provision that, "A victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system." N.J. Const. art. I, ¶ 22.

The Crime Victims Bill of Rights states in pertinent part that a "victim" of a crime, as defined in N.J.S.A. 52:4B-37, has a right:

m. To submit a written statement, within a reasonable amount of time, about the impact of the crime to a

representative of the prosecuting agency which shall be considered prior to the prosecutor's final decision concerning whether formal criminal charges will be filed, whether the prosecutor will consent to a request by the defendant to enter into a pre-trial program, and whether the prosecutor will make or agree to a negotiated plea;

n. To make, prior to sentencing, an in-person statement directly to the sentencing court concerning the impact of the crime . . .;

p. To be present at any judicial proceeding . . .; and

r. To appear in any court before which a proceeding implicating the rights of the victim is being held[.]

N.J.S.A. 52:4B-36(m), (n), (p), and (r). Sub-section (m) is limited to providing a written statement to the State's attorney. Sub-section (n) provides for statements to be made "directly to the sentencing court".¹ Sub-sections (p) and (r) permit physical presence of the victim.

The import of the rights set forth in N.J.S.A. 52:4B-36 is to humanize the victim so "that the victim [is] not a faceless stranger, but [is shown to be] a unique individual human being." State v. Muhammad, 145 N.J. 23, 47-48 (1996). The goal of the law is to improve the "treatment of these

¹ Similarly, a Defendant's right to allocution contemplates a statement by Defendant directly to the Court. State v. Cerce, 46 N.J. 387, 393-95 (1966).

persons", with "these persons" meaning "crime victims and witnesses." N.J.S.A. 52:4B-35. Though the Legislature amended the Crime Victims Bill of Rights several times, Muhammad, 145 N.J. at 32-35, the Legislature has never included any right of a victim or witness to directly address a defendant.

Rule 3:16(a) requires that "[t]he defendant must be present for every scheduled event unless excused by the court for good cause shown." Sub-section (b) of Rule 3:16 provides that "[t]he defendant shall be present at every stage of the trial, including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, unless otherwise provided by Rule." Sub-section (b) further provides, "Nothing in this Rule, however, shall prevent a defendant from waiving the right to be present at trial."

This Court has interpreted the "waiver" provision in Rule 3:16(b) in the context of conduct evidencing "forfeiture." This Court has held that "a defendant's knowing, voluntary, and unjustified absence before or after trial has commenced does not prevent trial from proceeding in absentia." State v. Hudson, 119 N.J. 165, 182 (1990). In Hudson, this Court recommended changes to Rule 3:16 that

now distinguish between waiver and forfeiture, and which expressly provide for a written or oral waiver.

Rule 3:16 evolved out of a federal rule of criminal procedure addressing a defendant's presence in court, i.e., Fed.R.Crim.P. 43. See generally, Hudson, 119 N.J. at 174-75 (discussing the adoption of Rule 2:10-2, which became Rule 3:5-4 and is now Rule 3:16). Under the Federal Rule, a defendant must be present at sentencing, Fed.R.Crim.P. 43(a)(3), but "need not be present" and may seek to be excused if being sentenced to a non-felony. Fed.R.Crim.P. 43(b)(2). The rationale for excusing a defendant's appearance in non-felony cases is that an appearance may constitute a hardship due to travel time and expense "not commensurate with the gravity of the charge, if a minor infraction is involved and a small fine is eventually imposed." Advisory Comm. Notes to Fed.R.Crim.P. 43, 1944 Adoption, comment 3.

The Federal Rule also provides that a defendant may waive his or her presence at sentencing by being "voluntarily absent". Fed.R.Crim.P. 43(1). When the waiver occurs, courts "may" proceed in the defendant's absence. Fed.R.Crim.P. 43(2). It is "envision[ed]" that defense counsel will continue to represent the interests of the defendant at sentencing" when the defendant absconds.

Advisory Comm. Notes to Fed.R.Crim.P. 43, 1995 Amendments,
comment 3. Thus, again, the waiver contemplates voluntary
absence through bad conduct, i.e., forfeiture, rather than
a request in advance, i.e., waiver. The latter is arguably
the procedure courts should welcome, especially where, as
here, it is motivated by a concern that one's appearance
will be disruptive to the judicial process.

In 1992, New Jersey added a waiver provision to Rule
3:21-4 that brought the rule into conformity with Rule
3:16. Rule 3:21-4(b) now provides in pertinent part,
"Sentence shall not be imposed unless the defendant is
present or has filed a written waiver of the right to be
present." The Rules do not set forth what factors courts
should consider in accepting or rejecting the waiver, or
whether there should be a requirement that a defendant
identify his or her reason for waiving the right to be
present at sentencing.

There is nothing extraordinary about allowing a
Defendant to waive his or her right to be present at
sentencing. Some of a defendant's most safeguarded rights
may be waived. For example, the State Constitution
provides:

No person shall be held to answer for a
criminal offense, unless on the
presentment or indictment of a grand

jury, except in cases of impeachment, or in cases now prosecuted without indictment, or arising in the army or navy or in the militia, when in actual service in time of war or public danger.

N.J. Const. art. I, ¶ 8. Though expressed in mandatory terms, this right may be waived. State v. Thomas, 187 N.J. 119, 132-33 (2006) (right to grand jury protections). The State Constitution also provides, "The right of trial by jury shall remain inviolate." N.J. Const. art. I, ¶ 9. This right may be waived. State v. Dunne, 124 N.J. 303, 316 (1991). The State Constitution also protects arguably the most solemn rights for protecting against tyranny by the Government:

In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

N.J. Const. art. I, ¶ 10. These rights too may be waived. State v. Grenci, 197 N.J. 604, 615 (2009) (right to be present at trial); State v. Cooper, 151 N.J. 326, 380-81 (1997) (waiver of right to trial and instead plead guilty); State v. DuBoise, 189 N.J. 454, 467 (2007); see also Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d

274 (1969) (waiver of right to trial by jury and right of confrontation).

This Court's decision in State v. Morton, 155 N.J. 383 (1998) is instructive. In Morton, this Court held:

We reject defendant's argument that he may not waive his right to be present at the penalty phase of his trial. A criminal defendant's right to be present at trial is grounded in the constitutional right to confront witnesses. The constitutional nature of this right, however, does not preclude its waiver. A criminal defendant can waive constitutional rights, including the right to counsel, the right to a trial by jury, and the right to remain silent.

In a non-capital case, a defendant's right to waive his or her presence at trial is clear. Even in a capital case, a defendant's right to be present is not absolute. A defendant may be removed from the courtroom without his consent if he behaves "in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." Although we have not decided previously whether a defendant may voluntarily absent himself from a capital trial, other jurisdictions have permitted such a waiver. We have, however, recognized a defendant's right to waive other fundamental rights in a capital case. Consistent with those authorities, we conclude that defendant is not precluded from waiving his right to be present in a capital case.

. . .

In sum, no policy precluded defendant from [penalty phase of] trial.

Id. at 434-37 (citations omitted).

Requiring a defendant to be physically present also lacks support in this State's sentencing provisions. N.J.S.A. 2C:1-2b identifies the purpose of sentencing as being:

- (1) To prevent and condemn the commission of offenses;
- (2) To promote the correction and rehabilitation of offenders;
- (3) To insure the public safety by preventing the commission of offenses through the deterrent influence of sentences imposed and the confinement of offenders when required in the interest of public protection;
- (4) To safeguard offenders against excessive, disproportionate or arbitrary punishment;
- (5) To give fair warning of the nature of the sentences that may be imposed on conviction of an offense;
- (6) To differentiate among offenders with a view to a just individualization in their treatment;
- (7) To advance the use of generally accepted scientific methods and knowledge in sentencing offenders; and
- (8) . To promote restitution to victims.

A Defendant's physical presence when sentence is imposed does not further the Legislature's stated purposes. While some may argue that condemnation requires a personal appearance, condemnation is given in the form of the sentence and not oral pronouncement of the sentence.

The State's sentence structure does not include punishment in the form of verbal rebuke or public ridicule expressed verbally. See generally, N.J.S.A. 2C:43-2 (sentences may include a fine, restitution, imprisonment, probation, community supervision or community-related service, residency in a halfway house or other residential facility, loss/suspension/cancellation of a license, removal from certain employment, forfeiture of property, or other civil penalties).

New Jersey's rule (Rule 3:16) does not incorporate the felony versus non-felony distinction employed by the Federal Rule. Regardless, even in felony cases, some courts have interpreted state rules modeled after Fed.R.Crim.P. 43 to allow, in certain circumstances, a defendant to waive his or her presence at sentencing. The Supreme Court of Kansas has held, "While the [state] statute is 'mandatory' in the sense that either party may demand compliance, it is no more jurisdictional than the many other constitutional and statutory mandates which may

be waived by a party for whose benefit they were fashioned." State v. Kelly, 515 P.2d 1030, 1035 (Kan. 1973).

More analogous to the issue presented here is the scenario that presented itself in State v. Braun, 853 P.2d 686 (Kan. 1993). In Braun, defendant pled nolo contendere to, among other charges, two counts of first-degree murder. Id. at 687. Defendant admitted to robbing two convenience stores, kidnapping the store clerks, and murdered them. Ibid. Upon entering the pleas in open court, Defendant "indicated that he did not wish to be present for sentencing." Ibid.

Defendant voluntarily executed an affidavit: (1) waiving his right to appear at sentencing; (2) acknowledging his right to be present; (3) acknowledging his right to address the court prior to sentence being imposed, right to allocution, and right to proffer a reason why sentence should not be imposed; (4) acknowledging his right to revoke his waiver at any time; and (5) stating that he conferred with counsel. Id. at 687-88. On the day of sentencing, defense counsel confirmed Defendant's intention to maintain the waiver. Id. at 688.

The Braun case implicated a holding of the Fifth Circuit Court of Appeals in U.S. v. Brown, 456 F.2d 1112 (5th Cir. 1972). The Fifth Circuit in Brown held that:

Only in the most extraordinary circumstances, and where it would otherwise work an injustice, should a court sentence a defendant in absentia, and then only under appropriate safeguards, as where the defendant has expressly waived his right to be present either by sworn affidavit or in open court for the record.

Id. at 1114.

The sentencing judge in Braun, though not citing to the "extraordinary circumstances" language in Brown, observed:

Given the unusual circumstance of this case [(no circumstances were present other than defendant having pled and then having waived his right to appear at sentencing)] and also given the fact- and quite frankly, Mr. Pierce [(the State's attorney)], the fact that this case has almost risen to explosive proportions because of your statements in public concerning your personal opinions as to [Defendant] which have no basis in this matter, the Court is going to accept the waiver and not require [Defendant] to be present.

Ibid. The Supreme Court of Kansas upheld the waiver by the sentencing judge in Braun because, pursuant to Brown, "extraordinary circumstances" could be gleaned from the record and the Defendant executed an affidavit waiving his

right to be present. Id. at 690. "The trial court concluded in this case that because of the explosive proportions of the case, it would accept the waiver. Thus, we may conclude that the federal test has been met." Ibid.

The appeal to the Supreme Court of Kansas in Braun focused on Defendant's challenge to his absence notwithstanding his waiver. The Braun Court held, while courts should encourage a Defendant to exercise his or her right to be present, "it is not incumbent upon the court or the prosecutor to force the defendant's appearance for sentencing over the defendant's objection." Id. at 691. If "extraordinary circumstances" can be discerned on the record, defendants can waive their right to be present.

To enable concurrent sentences, or arguably to limit costs to the State, some states have enacted statutes that permit a waiver when the defendant is incarcerated elsewhere. See e.g., Cal. Penal Code § 1203.2a. These cases involve probation violations when sentence has not already been imposed for the underlying violation. The waiver requires:

[A] request of the defendant made through his or her counsel, or by himself or herself in writing, if such writing is signed in the presence of the warden of the prison in which he or she is confined or the duly authorized representative of the warden, and the

warden or his or her representative attests both that the defendant has made and signed such request and that he or she states that he or she wishes the court to impose sentence in the case in which he or she was released on probation, in his or her absence and without him or her being represented by counsel.

Ibid. Substantial compliance with the waiver requirement has been accepted by the Supreme Court of California when, as in In re White, 460 P.2d 980 (Cal. 1969), Defendant is absent but represented by counsel during the sentencing. See also Walton v. State, 106 So.3d 522, 528-29 (Fl. Dist. Ct. of App. 2013) (defendants can waive their right to be present during resentencing).

Here, the Appellate Division cites to U.S. v. Turner, 532 F. Supp. 913, 915 (D.C. Cal. 1982), which holds that, "[o]n reflection, the Court has concluded that different policy considerations apply to sentencing, and that [Fed.R.Crim.P. 43] must be read literally to say that a defendant's presence at sentencing may not be waived." Id. at 915.

On its face, Rule 43 distinguishes between arraignment, plea, and imposition of sentence, on the one hand, and trial up to and including the return of the verdict, on the other hand. In the case of the former, the defendant's presence is required; in the case of the latter, presence may be waived.

Ibid. The Turner Court set forth different reasons why, as a matter of policy, a defendant should be present at sentencing. However, a defendant's presence does not ensure any of those policy considerations. A defendant's non-contemptuous yet disinterested or unconcerned appearance defeats each policy consideration identified in Turner.

The Appellate Division cited to Turner for the proposition that the State has an interest in "having defendant present at sentencing to face those he has wronged." New Jersey has not expressed "fac[ing] those [one] has wronged" as a State interest. As discussed supra, New Jersey does not afforded victims the right to face the defendant; the right's afford to victims ensure that they can face the court. Requiring a defendant to face those he has wronged is an ambiguous concept. Taken literally, a defendant in a death case has wronged the decedent. Requiring a defendant to face the decedent, through looking at a photograph of the decedent or otherwise, is arguably psychological punishment that amounts to cruel and unusual punishment in violation of the State and Federal Constitutions. See generally, U.S. const. Amend. VIII; N.J. Const. art. I, § 12.

The ACDL-NJ located few cases that deviate from the reasoning of Turner. For example, in the pre-Turner case of United States v. Boykin, 222 F. Supp. 398 (D.Md. 1963) the court accepted a waiver of an appearance at sentencing because of Defendant's dire medical condition. See Dawson v. State, 658 S.E.2d 755, 762 (Ga. 2008) (defendant waived his right to be present during the sentencing phase after being medically-cleared to attend but deciding that he would remain in the holding cell instead of sitting in court); Amaya-Ruiz, 121 F.3d 486, 495 (9th Cir. 1997) (defendant did not want to appear in court for sentencing while shackled and therefore verbally waived his right to remain at the sentencing hearing); see also Braun, 853 P.2d at 686 (discussed supra).²

However, there appears to be no compelling justification for requiring a defendant to be present at sentencing if the defendant knowingly, voluntarily, and

² The ACDL-NJ encountered difficulty locating analogous cases because many courts use the word "waiver" for conduct constituting "forfeiture". See generally, Freytag v. Commissioner, 51 U.S. 868, 894 n.2, 111 S.Ct. 2631, 2647 n.2, 115 L.Ed.2d 764 (1991) (Scalia, J., concurring in part) ("The [words 'waive' and 'forfeit'] are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision."). Also, several courts address a defendant's absence from sentencing in the context of absconding or disruptive conduct, but not a pre-sentence request to avoid being physically present in court prior to the disruption.

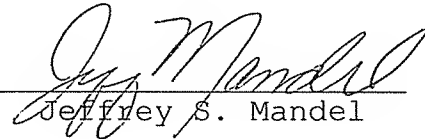
intelligently waives his right to be present. The sentence imposed constitutes society's punishment, not public rebuke prior to imposition of sentencing. Nowhere has the Legislature authorized that in addition to statutorily promulgated sentences, the court or the public is entitled to an additional sentence of verbal abuse, ridicule, or admonition.

A Defendant wishing to avoid a confrontation in court, as here, should be permitted to excuse himself, and execute a waiver. See e.g., Admin. Dir. #01-13 (March 18, 2013) (Waiver of First Appearance for Indictable Offense Form). A waiver should require the advice of counsel, which may be private counsel or a public defender. The waiver should be in writing and confirmed on the record. Defendant should then be required, via personal appearance or video/webcast, to reaffirm his or her waiver immediately prior to the commencement of sentencing.

CONCLUSION

For the foregoing reasons, amicus curiae Association of Criminal Defense Lawyers of New Jersey respectfully requests that this Court reverse the Appellate Division and hold that defendants in a criminal case may waive the right to appear at sentencing provided that certain procedural and substantive safeguards are met.

Respectfully submitted,

By: 
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Dated: 4-1-13